

REDACTED

**DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 North Capitol Street, NE, Suite 9100
Washington, DC 20002**

M.F.

Appellant/Claimant,

v.

Urban Hospital

Appellee/Employer.

Case No.: ES-P-07-107738

FINAL ORDER

I. INTRODUCTION

On July 2, 2007, Claimant M.F. filed an appeal of a Claims Examiner's Determination that was certified as served June 22, 2007, holding Claimant ineligible for benefits. The appeal raises the issue whether Claimant was discharged for cause constituting "misconduct" rendering her ineligible for benefits (for a period of time), as specified in the District of Columbia Unemployment Compensation Act (D.C. Code, 2001 Ed. § 51-110(b)); and 7 District of Columbia Municipal Regulations ("DCMR") 312.

This administrative court issued a Scheduling Order and Notice of In-Person Hearing on July 10, 2007, scheduling the hearing for July 26, 2007. On motion of Appellee/Employer (hereinafter "Urban Hospital," or "UH") and for good cause shown, the July 26 hearing was rescheduled to August 2, 2007, at 12:30 p.m. When the hearing convened on August 2, 2007, the parties asked to reschedule the hearing again due to a scheduling conflict. Thus, the hearing was rescheduled to August 7, 2007, at 10:30 a.m. Claimant was represented by Tonya Love, Esq., of the Claimant's Advocacy Program. Claimant testified on her own behalf at the hearing.

UH was represented by Patrice Hebda, Renaissance Unemployment Insurance Consultants. D. M., Clinical Manager, and A. S., Clinical Specialist, testified on behalf of UH. During the hearing, UH exhibits 200-207 were admitted as evidence. I relied on Court records marked for identification purposes as exhibits 300 and 301 to determine jurisdiction.

II. FINDINGS OF FACT

1. On July 2, 2007, Claimant appealed the Claims Examiner's June 22, 2007, Determination that Claimant was ineligible for unemployment benefits.¹

2. Claimant is a licensed Registered Nurse with a Bachelor's degree and fifteen years of nursing experience. Claimant's title at UH was Registered Nurse III. Claimant worked for UH from early 1992 until May 21, 2007. Since 1999, Claimant worked in a post-surgical recovery room referred to as "PACU" by UH. Claimant was a member of Nurses United of the National Capital Region union and her employment was governed by a collective bargaining agreement ("CBA"). Exhibit 205.

3. Under the CBA, UH has a progressive disciplinary system that consists of a verbal reprimand the first time an employee fails to meet established standards, a written reprimand for the second such instance, and termination for the third instance. Exhibit 205. In addition, UH agreed to limit the termination of nurses to situations where the nurse has three reprimands, but only if two of the three reprimands have occurred within eighteen months of each other and are "for a similar offense." Exhibit 205. The CBA groups "similar offenses" into three categories: 1) time and attendance related issues; 2) clinical practice issues; and 3) "all other types of offenses." Exhibit 205. The *Notice of Disciplinary Action* form used by UH allows management

¹ Nothing in the record below indicates any issue has been raised or preserved concerning factors under D.C. Code, 2001 Ed. § 51-109; e.g., base period eligibility, availability for work.

to check one of three boxes to categorize the “type of offense” according to the categories identified in the CBA, as referenced above. These categories are: “Attendance,” “Clinical Practice,” and “Other.”

4. On December 22, 2005, Claimant received a Step II written warning for excessive tardiness. Exhibit 207. Claimant received a Step I verbal reprimand on or about October 6, 2006, for excessive absences (nothing in the record explains why the disciplinary action in December 2005 was considered Step II, but the reprimand in October 2006, was considered Step I). Exhibit 200. The type of offense was noted on both reprimands as “Attendance.”

5. On or about March 20, 2007, Claimant received a Step III written warning. Exhibit 201. When UH issued the March 20, 2007, Step III written warning it did not check one of the boxes used to categorize the offense. Exhibit 201. Claimant was reprimanded because she gave food to a patient awaiting surgery. Patient T.W., who was in the PACU, had asked Claimant to take juice and crackers to his escort, Alvin R., in the surgical waiting area. Alvin R. is a diabetic and had not eaten while he waited for T.W. to be released. Claimant did so; however, when she called the name of the escort (Alvin R.) a patient (Anthony R., whose last name is the same as Alvin R.) waiting for surgery responded to Claimant. Even though Claimant noted to Anthony R. that T.W. (whose full name she used) had asked her to bring him the food, Anthony R. neither indicated that he was not Alvin R. nor that he did not know T.W. Instead, Anthony R. ate the food. Later, Claimant learned that Anthony R. was not T.W.’s escort Alvin R. Anthony R. could not have his surgery that day because he ate the food given to him by Claimant. Exhibit 201. Once Claimant learned of her error, she notified the appropriate UH personnel.

6. On April 25, 2007, Claimant was alone in the PACU at 8:15 a.m. However, while Claimant was still alone in the PACU, two patients were transferred to the unit; so, Claimant called her supervisor to request that another nurse be sent to PACU to assist her. Assistance was not forthcoming. Later, as a third patient was being wheeled into the PACU, Claimant received a call indicating that a fourth patient was on the way. So, Claimant called her supervisor again to get assistance. However, assistance was still not forthcoming. When the fourth patient arrived, Claimant called her supervisor a third time to get assistance. A nurse, Ms. B. (apparently this is her regularly used nickname, but neither party provided her complete name), finally came to the PACU at approximately 8:55 a.m.

7. One of the people in the PACU that morning was patient G.S. Patient G.S. was brought to the PACU immediately after minor surgical procedures and was being prepared for discharge. Patient G.S. entered the PACU at approximately 8:45 a.m. and stayed until he was transferred to the secondary PACU (the last stop before discharge) at 10:55 a.m. Exhibit 206. Claimant was the nurse who admitted patient G.S. to the PACU. Exhibit 206.

8. The range of “normal” heart rates is between 80 and 100. Patient G.S.’s heart rate fluctuated and was elevated almost the entire time he was in the PACU. Exhibit 206. His heart rate and the times it was recorded in his PACU Monitoring Record (“Chart”) were:

TIME	HEART RATE
8:45 a.m.	110
8:55 a.m.	85
9:05 a.m.	102
9:15 a.m.	113

9:30 a.m.	110
9:45 a.m.	120
10:15 a.m.	116
10:45 a.m.	104
10:58 a.m. (at the point of discharge to the secondary PACU).	110

Exhibit 206.

9. At approximately 10:00 a.m., Claimant gave G.S. pain medication, which she knew would help to reduce his heart rate. Otherwise, Claimant did not intervene to stabilize G.S.'s heart rate, or call a doctor to seek his/her intervention.

10. Among the other data recorded in G.S.'s Chart, is a "strip" that is a graph of G.S.'s heart beats. This graph establishes that G.S.'s heart beat was irregular in a manner best diagnosed as Atrial Fibrillation. Exhibit 206. Claimant remembered that G.S. had a history of Atrial Fibrillation from his medical records; nonetheless, Claimant erroneously described G.S.'s heart beat on the strip as Sinus Tachycardia. Exhibit 206. Claimant did not intervene to address G.S.'s condition. Additionally, in another relevant portion of G.S.'s Chart, Claimant failed to note that G.S. had Atrial Fibrillation (the distinction between Atrial Fibrillation and Sinus Tachycardia is medically significant). Exhibit 206.

11. At approximately 8:55 a.m., Nurse B., used a "finger stick" to check G.S.'s blood sugar. G.S.'s blood sugar was recorded in his Chart as 275. Exhibit 206. The "normal" range is from 65-125. Exhibit 206. No one in the PACU addressed G.S.'s high blood sugar.

12. Claimant was required to monitor G.S.'s Modified Aldrete Score on his Chart. The Modified Aldrete Score tracks, among other things, G.S.'s hemodynamic stability to assist staff in monitoring G.S.'s recovery from the anesthesia he received during his surgical procedures. The hemodynamic stability score measures whether a patient's heart rate and blood pressure are within 20% of their pre-operational values. Exhibit 206. G.S.'s pre-operational values were a heart rate of 96 and blood pressure of 109/66. Exhibit 206. At 8:45 a.m., Claimant correctly assessed G.S.'s values as within 20% of his pre-operative values, as reflected by the "2" she entered on the Modified Aldrete Score. Exhibit 206. At 9:15 a.m., even though G.S.'s blood pressure had risen more than 20% from his pre-operative value, Claimant assessed G.S. as within 20% as reflected by the "2" she entered on the Modified Aldrete Score. Exhibit 206. At 9:45 a.m., G.S.'s blood pressure had dropped to within the 20% of his pre-operative values; however, his heart rate had risen more than 20% from his pre-operative value. In spite of the rise in his heart rate, Claimant still assessed G.S. as within 20% of his pre-operative values as reflected by the "2" she entered on the Modified Aldrete Score. Exhibit 206. At 10:45 a.m., Claimant correctly assessed G.S.'s heart rate and blood pressure as within 20% of his pre-operative values, as reflected by the "2" she entered on the Modified Aldrete Score. Exhibit 206.

13. At 10:55 a.m., G.S. was transferred to the secondary PACU as a final step toward his release that day. Exhibit 206. While in the secondary PACU, it was determined that G.S.'s Atrial Fibrillation, fluctuating and (mostly) elevated heart rate were an indication of serious heart trouble. Eight hours after being transferred to the secondary PACU, G.S. was admitted into the Cardiac Unit at UH. Exhibit 206. At the time of his admission to the Cardiac Unit, G.S.'s blood pressure was 114/57 and his heart rate was 139. G.S. spent approximately one week in the Cardiac Unit. Exhibit 206.

14. The Anesthesiologist who treated G.S. during his surgical procedures approved G.S.'s transfer from the PACU to the secondary PACU. Exhibit 206.

15. It is standard procedure at UH for nurses to make an after-the-fact entry to medical records, so long as the added information is labeled "late entry nursing note."

16. On May 22, 2007, Claimant received a Step III Notice of Disciplinary Action form indicating that given the errors she made in the provision of care to patient G.S. Claimant was being terminated for cause. Exhibit 202.

III. DISCUSSION AND CONCLUSIONS OF LAW

In accordance with D.C. Code, 2001 Ed. § 51-111(b), any party may file an appeal from a Claims Examiner's Determination within ten calendar days after the mailing of the Determination to the party's last-known address or, in the absence of such mailing, within ten calendar days of actual delivery of the Determination. The Determination in this case contains a certificate of service dated June 22, 2007. Claimant's appeal request was filed with this administrative court on July 2, 2007. The appeal was timely filed and jurisdiction is established. D.C. Code, 2001 Ed. § 51-111(b).

Generally, any unemployed individual who meets certain statutory eligibility requirements is qualified to receive benefits. D.C. Code, 2001 Ed. § 51-109. The law, however, creates disqualification exceptions to the general rule of eligibility. If an employee is discharged for misconduct, the employee is disqualified from receiving benefits for a period of time. D.C. Code, 2001 Ed. § 51-110(b). The burden is on the employer to establish an exception for an employee who would otherwise be eligible for unemployment insurance benefits under D.C.

Code, 2001 Ed. § 51-109; *i.e.*, to show that the employee committed an act which would constitute misconduct (gross or otherwise). 7 DCMR 312.2 (burden of production on party alleging misconduct); *McCaskill v. D.C. Dep't of Employment Servs.*, 572 A.2d 443, 446 (D.C. 1990).

The governing regulations (7 DCMR 312) define “gross misconduct” as:

an act which deliberately or willfully violates the employer's rules, deliberately or willfully threatens or violates the employer's interests, shows a repeated disregard for the employee's obligation to the employer, or disregards standards of behavior which an employer has a right to expect of its employee.

If the basis for disqualification from benefits is a violation of the employer’s rules, the following criteria must be met to uphold the disqualification:

- (a) That the existence of the employer’s rule was known to the employee;
- (b) That the employer’s rule is reasonable; and
- (c) That the employer’s rule is consistently enforced by the employer.

7 DCMR 312.7; *Jones v. D.C. Dep't of Employment Services*, 558 A.2d 341, 342-343 (D.C. 1989).

Additionally, pursuant to decisions of the District of Columbia Court of Appeals, when more than one reason is given for an employee’s discharge, this administrative court must first determine whether the reasons operated independently or in the aggregate to prompt an employer’s dismissal decision:

When [more than one] reason[] for discharge [is] presented by an employer, the appeals examiner must make a finding as to whether those reasons were independent or whether they each contributed toward a “critical mass” that ultimately resulted in the employee’s discharge. *See Smithsonian Inst. v. District of Columbia Dep't of Employment Servs.*, 514 A.2d 1191, 1194 (D.C. 1986) (quoting *Jones v. District of Columbia Unemployment Compensation Bd.*, 395 A.2d 392, 396-97 (D.C. 1978)).

Harker v. D.C. Dep't of Employment Servs., 712 A. 2d 1026, 1029 (D.C. 1998).

Where the reasons are independent, an employee may be disqualified from receiving unemployment benefits if the employer proves that any one of those reasons constitutes misconduct. Where the reasons constitute a mutually dependent “critical mass,” an employee will be disqualified for misconduct only if the employer proves each of the reasons given constitute misconduct. *See Smithsonian Inst. v. D.C. Dep’t of Employment Servs.*, 514 A.2d 1191, 1192 (D.C. 1986) (where employer gave four “mutually dependant” reasons for employee’s firing, “all four had to be proven” to show a misconduct disqualification). In this case, the record shows that UH discharged Claimant only because the written warning issued in response to the April 25, 2007, incident concerning G.S. was her third (or fourth) reprimand under UH’s progressive discipline system. Exhibit 205. Therefore, Claimant may only be disqualified from receiving unemployment benefits if it is proven by a preponderance of evidence that each of the incidents for which Claimant received a written warning constitutes misconduct. *See Jones v. D.C. Unemployment Comp. Bd.*, 395 A.2d 392, 295 (D.C. 1978) (this administrative court cannot reject an employer’s rationale for terminating an employee and yet deny unemployment benefits on a misconduct theory that is independent of the employer’s determination).

UH introduced a Step II written warning issued on December 21, 2005, but received by Claimant on December 22, 2005, for excessive tardiness. Exhibit 207. It was introduced as the first step in the progressive discipline process and the first of two reprimands for violation of time and attendance rules. *See also* exhibit 200, the October 5, 2006, reprimand for excessive absences. However, for two reasons I am persuaded that the December 22, 2005, warning was not actually considered in the decision to terminate Claimant. One, the testimony of UH witnesses D. M. and A. S. was focused primarily on the three written warnings issued after

December 22, 2005 (October 5, 2006, March 20, 2007, and May 21, 2007). UH made it a point to argue that the March 20 and May 21, 2007, written reprimands (exhibits 201 and 202) were similar offenses (clinical practice violations), which allowed for Claimant's termination under the CBA (which requires three reprimands with two of the three reprimands being "similar" offenses). Two, Ms. S.'s testimony was that the workplace rules and progressive discipline system are consistently enforced at UH. If the December 22, 2005, written reprimand had been taken into active consideration during Claimant's subsequent tenure, according to UH rules, Claimant should have been fired on or about March 20, 2007 (exhibit 201), because that was when she received her third consecutive written reprimand, two of which were for similar offenses (attendance). Exhibits 207 and 200. I conclude UH did not take the December 22, 2005, reprimand into consideration when it terminated Claimant, but rather in preparing for this hearing determined that it provided an additional, after-the-fact justification for Claimant's termination. I will only take the October 5, 2006, and March 20, and May 21, 2007, written reprimands into consideration as I evaluate whether Claimant was terminated for acts constituting misconduct.

As it relates to the October 5, 2006, verbal reprimand (exhibit 200) for excessive absences, I conclude that UH has proven by a preponderance of evidence that: a) Claimant was aware of the rule prohibiting "excessive absenteeism," exhibit 203 (7 DCMR 312.7(a)); and b) the UH rule prohibiting excessive absenteeism is reasonable, as the hospital has an obligation to ensure that patient needs are met and it cannot do so without staff working their assigned shifts (7 DCMR 312.7(b)). However, for the reasons set forth below, I do not conclude that consistently enforces this rule. 7 DCMR 312.7(c).

As it relates to the March 20, 2007, written warning (exhibit 201) issued to Claimant for having given patient Anthony R. juice and cookies when this food should have gone to escort Alvin R., I conclude that UH has not proven by a preponderance of evidence that Claimant was aware that, in making an error such as this, she was violating a clinical practice rule. 7

DCMR 312.7(a). UH presented no evidence to establish that in attempting to give the food to Alvin R., the escort, she was exercising her clinical/nursing judgment.² The evidence presented established that Claimant made an error which had clinical implications, but there is no evidence that leads me to conclude that delivering the food to Alvin R. required nursing skills, or required Claimant to use her clinical judgment. Rather, I conclude that virtually any employee of UH possesses the skills required to carry out the simple task of delivering juice and cookies to someone who was an escort, not a patient. Of course, I recognize Claimant made an avoidable error that could have had serious consequences (though there is no evidence of any negative health outcome for Anthony R. associated with the error). However, the law in the District of Columbia requires employers to prove that the employee's actions amounted to more than negligence in order for an employee to be disqualified from unemployment benefits. *The Washington Times v. D.C. Dep't of Employment Servs.*, 724 A.2d 1212, 1217-18 (D.C. 1999) (“[o]rdinary negligence in disregarding the employer's standards or rules will not suffice as a basis for disqualification for misconduct.”) (citing *Keep v. D.C. Dep't of Employment Servs.*, 461 A.2d 461, 462-63 (D.C. 1983)).³

² For instance, UH could have presented expert opinion testimony. See Fed. R. Evid. 701 (witness may not offer testimony that is based on scientific, technical, or other specialized knowledge unless qualified as an expert) and Rule 702. *Randolph v Collectramatic, Inc.*, 590 F2d 844, (10th Cir. 1979) (Rule 701 does not permit lay witnesses to express opinion evidence as to matters which are beyond the realm of common experience, and which require special skill and knowledge of expert witness).

³ Given my conclusion that UH did not prove that Claimant knew of a rule she allegedly violated when she made this error, I cannot conclude that UH's “rule” is reasonable, or that the “rule” is consistently enforced. 7 DCMR 312.7 (b) and (c).

As it relates to the May 21, 2007, written warning (exhibit 202), concerning the care of G.S. while he was in the PACU, I conclude that UH has failed to prove by a preponderance of evidence that Claimant deviated from the standards of care. UH alleged that Claimant deviated from the standard of care by: a) misreading the strip printout of G.S.'s heart beat, such that it was labeled inaccurately Sinus Tachycardia rather than Atrial Fibrillation; b) failing to document G.S.'s Chart completely; c) misinterpreting G.S.'s vital signs regarding his hemodynamic stability, such that she inaccurately recorded values on the Modified Aldrete Score two out of four times; d) failing to inform a doctor of G.S.'s fluctuating, mostly elevated heart rate; e) failing to brief the Anesthesiologist of G.S.'s status before the Anesthesiologist approved G.S.'s transfer to the secondary PACU; and f) failing to respond to G.S.'s elevated blood sugar.

Claimant acknowledges that she made the first three errors (misreading the strip printout, failing to document G.S.'s Chart completely, and inaccurately recording two of four values on G.S.'s Modified Aldrete Score). However, Ms. S. made clear when she testified that it was all of the errors in the aggregate that caused UH to decide to terminate Claimant, and on the question of whether Claimant deviated from the standard of care for the remaining "errors" (failing to inform the doctor of G.S.'s fluctuating heart rate, failing to brief the Anesthesiologist prior to her approving G.S.'s transfer, and failing to respond to G.S.'s elevated blood sugar), UH has failed to prove its case.

Specifically, on the question of informing the doctor of G.S.'s fluctuating, mostly elevated, heart rate, Ms. S. credibly testified that a nurse's job is to report a problem of this nature to the doctor in charge. However, Claimant credibly testified that as a recovery room nurse, her obligation is to troubleshoot these problems, as there are numerous reasons why a

person's post-surgical heart rate could fluctuate and be elevated as was G.S.'s. Claimant noted, and UH never refuted, that pain, the need to urinate, stress, anxiety and a headache are possible causes. Claimant testified that given the information she had available, as an experienced recovery room nurse, the standard of care did not dictate that she inform a doctor of G.S.'s heart rate. I have no basis to reject this information, as UH never presented expert testimony that the standard of care in a recovery room is something other than what Claimant said.⁴ In the absence of such testimony, I have two very credible, experienced nurses providing conflicting evidence. As UH has the burden of proof, I conclude that it has not met its burden.

On the question of briefing the Anesthesiologist before the Anesthesiologist approved G.S.'s transfer to the secondary PACU, Claimant testified that the doctor reviewed the Chart and indicated her approval by signing the Chart before the transfer occurred. Ms. S. testified that, even though this is not best practice, anesthesiologists rarely read the charts before signing them, instead relying on a verbal briefing from the recovery room nurse. Additionally, Ms. S. testified that the Anesthesiologist who signed G.S.'s Chart may have actually approved the transfer at the point of G.S.'s *admission* to the PACU and never reviewed the Chart again. This testimony is unbelievable and, if true, somewhat frightening. A doctor who approves a transfer from one unit to another, on the basis of a patient's health, but never reviews that patient's vital health information, which is on the very form they have to sign to approve the transfer, is putting patients at risk. Either way, the evidence before me is a form signed by an Anesthesiologist approving the transfer and the testimony of Claimant who says she discussed G.S. with the Anesthesiologist before the Anesthesiologist signed the form. Consequently, I conclude that UH

⁴ See footnote 2 above.

has failed to prove by a preponderance of evidence that Claimant deviated from the standard of care.

Finally, on the question of Claimant's alleged failure to respond to G.S.'s elevated blood sugar, the testimony is conflicting. Claimant testified that Nurse B. tested G.S.'s blood sugar and that after obtaining the results Nurse B. should have effectuated the proper intervention. Ms. S. disagreed and testified that G.S. was Claimant's patient so that she was responsible for obtaining treatment for G.S.'s elevated blood sugar. Again, I have two highly credible, experienced nurses offering conflicting testimony. However, UH has the burden of proof and it did not prove by a preponderance of evidence that Ms. S.'s testimony correctly articulated the governing standard of care. In the absence of expert testimony, or other evidence, it is impossible for me to determine whether UH's position is accurate.⁵

Therefore, as it relates to the May 21, 2007, written warning (exhibit 202), I conclude that UH has failed to establish by a preponderance of evidence that Claimant knew the governing work place rule (7 DCMR 312.7(a)), or that the rule as applied to Claimant was reasonable (7 DCMR 312.7(b)).

Moreover, UH has failed to establish by a preponderance of evidence that it consistently enforces its progressive disciplinary system. 7 DCMR 312.7(c).⁶ As noted above, Claimant received a written warning regarding excessive tardiness on December 22, 2005. Exhibit 207. On October 5, 2006, she received a second written warning regarding excessive absences. Exhibit 200. Claimant received a third written warning on March 20, 2007. Exhibit 201. Based

⁵ See footnote 2 above.

⁶ I do conclude that Claimant knew of the progressive discipline system (exhibits 203 and 205) and that having a progressive disciplinary system is reasonable. 7 DCMR 312.7(a) and (b).

on the progressive discipline system, Claimant should have been terminated at that point in time; however, UH did not take action against Claimant. Rather, UH waited until May 21, 2007, after another incident, to enforce the progressive discipline system against Claimant. Therefore, I conclude that UH is not enforcing consistently its progressive discipline system.

Consequently, while I understand UH's decision to terminate Claimant, I do not believe that it has proven by a preponderance of evidence that Claimant's discharge was the result of acts constituting misconduct. 7 DCMR 312.

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is, this 15th day of August 2007

ORDERED that the Determination of the Claims Examiner that Appellant/Claimant M.F. is ineligible for unemployment benefits is **REVERSED**; it is further

ORDERED that Appellant/Claimant M.F. is **ELIGIBLE** for unemployment compensation benefits; it is further

ORDERED that the appeal rights of any person aggrieved by this Order are stated below.

August 15, 2007

_____/SS/
Jesse P. Goode
Administrative Law Judge